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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

July 7, 1995

Secretary  
Federal Communications Commission  
1919 M Street, NW  
Room 222  
Washington, D.C. 20036

DOCKET FILE COPY ORIGINAL

**Re: Comments of the National Indian Gaming Association On Implementation of Section 309(j) of the Communications Act -- Competitive Bidding**

Dear Mr. Secretary:

This letter is respectfully submitted at the request of Chairman Hundt<sup>1</sup> and contains comments regarding the establishment of a rebuttable presumption of the competitive effects of gaming. I am Richard G. Hill, chairman of the National Indian Gaming Association, which represents over 140 Indian tribes and Alaskan Native Corporations.

NIGA applauds the recognition by the Federal Communications Commission (FCC) that the Indian Commerce Clause of the United States Constitution provides an independent basis for the affiliation exception for Indian tribes and Alaskan Regional or Village corporations.<sup>2</sup> Tribal sovereignty is a long-standing principle of Indian law. The basic governmental power of tribes is not delegated by Congress; rather it is inherent and can only be abrogated if

<sup>1</sup> *Further Notice of Proposed Rulemaking, Implementation of Section 309(j) of the Communications Act--Competitive Bidding*, Docket No. 93-253 (released June 23, 1995) ¶ 20.

<sup>2</sup> *Id.* at 13.

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Congress expresses a clear intent to do so. Tribes possess "inherent powers of limited sovereignty which have never been extinguished."<sup>3</sup> Indian tribes are distinct from both states and foreign nations. An early Supreme Court Case described tribes as "domestic dependent sovereigns."<sup>4</sup>

Tribes have the authority to govern their own internal affairs and to exercise civil regulatory jurisdiction on Indian lands within reservation boundaries. Within their reservations, tribes generally retain all powers other than those given up in treaties or taken away by act of Congress. This includes the right to conduct gaming. The United States Supreme Court recognized the right of Native Americans to run gaming when it ruled that states had no authority to regulate gaming on Indian land if such gaming is permitted outside the reservation for any other purpose.<sup>5</sup> Congress affirmed this decision and established a legal basis for this right when it passed the Indian Gaming Regulatory Act (IGRA) in 1988.<sup>6</sup>

The declaration that funds derived by tribes from Indian gaming represent a non-traditional form of revenue and creates an unfair competitive advantage in the PCS auction undermines tribal sovereignty in an unprecedented manner, questions the mandates of Congress, and perpetuates and capitulates to the myths surrounding Indian gaming.

Gaming is one of the oldest forms of recreation; not only did Europeans bring new games to the "New World," but Indians have traditional games still played today. In fact, Indian gaming existed long before Europeans settled in America. Large-scale Indian gaming, mainly in the form of bingo, predated IGRA by about 10 years. Today, as mandated by Congress via IGRA, Indian tribes must use all funds derived from tribal gaming operations solely for governmental or charitable purposes. In fact, one of the purposes of the act is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."<sup>7</sup>

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<sup>3</sup> David Getches, Charles Wilkinson, and R. Williams, *Federal Indian Law*, 3rd Ed. (West Publishing 1993).

<sup>4</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17. (1931)).

<sup>5</sup> *California v. Cabazon and Morongo Bands*, 480 U.S. 202 (1987).

<sup>6</sup> 25 U.S.C. §2701, *et seq.*

<sup>7</sup> 25 U.S.C. §2710 (b)(2)(B), 2710 (d)(1)(a)(ii).

Much like state governments and the use of funds from 40 state lotteries, tribal governments determine how to use gaming revenues. Indian tribes are using gaming revenues to build houses, schools, roads and sewer and water systems; to fund health care and education of their people, and to develop a strong, diverse economic base for the future.

In the comments surrounding the establishment of the rules in the Fifth Memorandum Report and Order, the FCC stated that gaming revenues are "exceptional revenues."<sup>8</sup> This statement panders to the myths propagated by our opponents in New Jersey and Nevada and the media scrutinization of certain tribes. Publicity concerning Indian gaming has often focused on the few operations that have been a spectacular success. However, there are 115 tribes in 22 states which have some sort of gaming establishment, ranging from bingo operations to class III casino-style operations. Of these 115 tribes, only one or two have realized dramatic success. The rest consist of more moderate operations. This can be witnessed by looking at the gaming ventures in Northern Wisconsin or South Dakota. These do not compare to the casinos in Las Vegas or Atlantic City and hardly raise enough revenue to be claimed "exceptional." Furthermore, given the enormous backlog of need on reservations, it will take several decades of sustained revenue flow to create the opportunities for economic parity.

In the same comment, Cook Inlet Regional Corporation argued "that these revenues were not part of the tribal economic picture when Congress enacted the SBA tribal exception to the affiliation rule in 1970."<sup>9</sup> The tribal exception to the Small Business Administration's affiliation rules were passed in 1990, **not** 1970. Therefore, Congress was cognizant of the effect of gaming revenues when it passed the SBA tribal exemption. In fact, prior to 1990, Congress saw the introduction of 12 bills relating to Indian gaming. Both chambers endured extracted debate over the issue in 1988 when they passed IGRA, two years prior to the passage of the SBA tribal exemption. In fact, since 1990, Congress has remained aware of the issues surrounding Indian gaming as witnessed by the fact

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<sup>8</sup> *Fifth Memorandum Opinion and Order, In the Matter of Implementation of Section 309(j) of the Communications Act--Competitive Bidding*, Docket No. 93-253 (released November 23, 1994) ("Fifth MO&O") ¶ 44.

<sup>9</sup> *Id.*

that 27 Indian gaming related bills have been introduced and numerous hearings on the issue have been held in the last five years.

Cook Inlet further contends that gaming revenues could provide a tribe with a "non-traditional source of revenue that could be very substantial."<sup>10</sup> As previously stated, gaming has been a traditional part of Native American culture prior to the arrival of the Europeans. Only after the relatively recent popularity of bingo did gaming also become economically beneficial to tribes. However, simply because a tribe has a gaming facility does not automatically mean that it is generating an inherently substantial source of revenue. This resource must be viewed in the context of sources of income of other tribes.

For example, are radio and broadcast facilities a traditional source of income for an Indian tribe? If a tribe or Alaskan corporation were to possess such facilities, would they automatically create a substantial source of revenue which might give them an unfair advantage in a situation such as these auctions? This question would have to be answered on a case by case basis. The same is true for other substantial sources or tribal revenues, such as petroleum or natural gas development, the operation of ski resorts, the ownership of large retail markets, or exploitation of timber resources.

Put another way, the United States Government decided on the location of Indian tribes in the creation of the reservation system. In doing so, the United States Government limited the means by which a tribe could raise revenues while still remaining a cohesive community. An Alaskan native corporation can reap the benefits of oil and gas exploration due to their location. A tribe in Washington state can enjoy substantial revenue due to harvest timber on their land. Yet, the FCC, quite correctly, does not deny these tribes the right to participate as a majority holder in this most important economic opportunity. However, the FCC does discriminate against tribes with reservations in states which have recognized their legal right to engage in gaming and have the geographic location which allows them to undertake this venture.

For many of these reservations, gaming has provided the only successful source of economic development. These tribes must take advantage of their location in order to develop their economies and

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<sup>10</sup> Id.

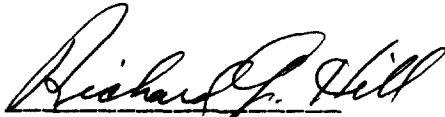
help their people. The Federal Government/Bureau of Indian Affairs has not been successful in the economic development of reservations. The states have not proposed any specific or credible alternatives to gaming as a meaningful source of tribal revenues and jobs. However, tribal governments are using gaming proceeds to diversify and conduct other economic enterprises. The rule proposed by the FCC has managed to create an obstacle to a potential form of economic development for tribes which wish to diversify. Tribes realize that gaming will not be in existence forever. Since the 1987 *Cabazon* decision, this sovereign right, like many others, has been eroded and its foundation is questionable. In the meantime, enterprising tribes are seeking other methods to ensure a bright future for the seventh generation. Perhaps, investment in the PCS technology is one such method to ensure the future. Unfortunately, this rule will prevent such an endeavor.

Indian tribes, as you know, are not a racial classification. They have a unique legal status in the history of this nation. Yet, it goes much deeper than that. Indian tribes are cohesive communities which face constant challenges to their sovereignty and economic well-being. Tribes are losing the latter battle. American Indians are the poorest of the poor, a fact which cannot be eradicated through eight years of gaming under the auspices of IGRA nor contradicted by narrowly tailored television news magazines. The passage of this rule marks another battle lost in the war for economic prosperity. This calls to mind a quote from Marge Anderson, chief executive of the Mille Lacs Band of Ojibwe and an eminent Native American leader:

When Indian incomes are level with yours, when our schools are as good as yours, our houses as warm, our kids as safe and our woods and streams as clean as yours, when our babies first open their eyes to as bright a future as yours, then we'll talk about level playing fields. Whether out of greed or out of racism or out of ignorance, there are always some who will go after Indian self-determination and economic development in ways as old as Columbus, as bold as Custer and as devious as any Federal land grabber.

Thank you in advance for your consideration of my comments.  
If you have any questions or comments, please feel free to contact  
me.

Very Truly Yours,

A handwritten signature in cursive script, reading "Richard G. Hill". The signature is written in dark ink and is positioned above the printed name.

Richard G. Hill  
Chairman  
National Indian Gaming Association